VOLUNTARY ASSIGNMENTS AND INSOLVENCY IN MASSACHUSETTS.

WHILE the insolvent laws of Massachusetts have been much developed, and have occupied much of the field formerly covered by voluntary assignments for the benefit of creditors, many of the largest cases of adjustments between debtors and creditors are still settled outside of the courts. It has been often argued, but never, so far as the writer is aware, clearly decided, that a voluntary assignment can be upset in all cases by proceedings *in invitum* under the insolvent laws. If such is the fact, it must depend upon some provisions of those laws, and to determine the fact it becomes necessary to review the history of both systems of liquidation and of their relations to each other.

At common law one could transfer his property to whomsoever he pleased, provided he had not already passed the title to another; in other words, a conveyance could be set aside only by those having a prior title. This right was much abused, and led to the statutes of Elizabeth making conveyances void when they tended to delay, hinder, or defraud creditors,[1] or when thereby subsequent purchasers for value were deprived of their rights.[2]

There was, however, nothing in these statutes to prevent a man's paying his debts in whatever way he pleased, and to whichever creditors he chose, and therefore a direct preference to a creditor was perfectly valid;[3] but in Massachusetts the absence of full equity powers in the courts, and more especially the statutes establishing attachment on mesne process, led to the qualification that the creditor must assent to and accept the preference.[4] So

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[1] 13 Eliz. ch. 5.

[2] 27 Eliz. ch. 4.

[3] Russell *v.* Woodward, 10 Pick. 408 (1830); Stevens *v.* Bell, 6 Mass. 339 (1810); Widgery *v.* Haskell, 5 Mass. 144, 153 (1809); First National Bank of Easton *v.* Smith, 133 Mass. 26, 31 (1882); Green *v.* Tanner, 8 Met. 411, 421 (1844); Bernard *v.* Barney Myroleum Co., 147 Mass. 356 (1888); Giddings *v.* Sears, 115 Mass. 505 (1874); Frank *v.* Bobbitt, 155 Mass. 112 (1890); Train *v.* Kendall, 137 Mass. 366 (1884); May *v.* Wannemacher, 111 Mass. 202 (1872); Adams *v.* Blodgett, 2 W. & M. 233 (1846).

[4] Stevens *v.* Bell, 6 Mass. 339, 342 (1810); Widgery *v.* Haskell, 5 Mass. 144, 153 (1809).

when sued the debtor might confess his debt, or be defaulted.[1] Even a conveyance fraudulent as to creditors was good against the grantor and his heirs.[2]

One of the first cases in which the preferring of creditors was done by a trust instead of by a direct conveyance or payment was Widgery *v.* Haskell.[3] The assignment in this case recited the desire of the assignors that all their property should be fairly distributed to their creditors, except that certain indorsers on bonds were to be first paid in full. The plaintiffs, who were assignees under the deed of trust, agreed to distribute the property assigned *pro rata* to all creditors who would release any suits pending, and release the assignors from all liability, and give notice within six months of their consent to the arrangement. The defendant was a sheriff holding under an attachment in the suit of a creditor who did not assent to the assignment, and it appeared that the property attached was not necessary to pay either the preferred creditors mentioned in the assignment or the assignees themselves. The assignees were the only unpreferred creditors who assented to the arrangement. The court held the assignees were not entitled to recover. The opinion is full of *dicta*, some of which were erroneous.[4]

The court said that creditors must assent to the preference or the payment as much where it was made indirectly as where it was made directly, and that such assent could not be presumed to exist.[5] The reason for requiring the assent of creditors was the same as in the case of a direct conveyance, and the absence of equity powers to control a trust in favor of creditors, not parties, seemed to be the chief difficulty the court felt in upholding the assignment. They say, however, "We would not be understood as giving an opinion that an insolvent debtor cannot convey an estate in trust to pay particular creditors who are assenting and parties to the

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[1] Eastman *v.* Eveleth, 4 Met. 137, 149 (1842).

[2] Drinkwater *v.* Drinkwater, 4 Mass. 353, 357 (1808). And the same is true of a conveyance in fraud of the insolvent law. Potter *v.* Belden, 105 Mass. 11 (1870).

[3] 5 Mass. 144 (1809). Cf. Hatch *v.* Smith, 5 Mass. 42 (1809).

[4] It has been decided, for example, *contra* to the *dictum* of Parsons, C. J., that an assignment containing a provision for the release of claims by creditors is perfectly good. See Borden *v.* Summer, 4 Pick. 266; Andrews *v.* Ludlow, 5 Pick. 28; Lupton *v.* Cutter, 8 Pick. 298.

[5] Page 153. Followed in Ward *v.* Lewis, 4 Pick. 518; New England Bank *v.* Lewis, 8 Pick. 113; Viall *v.* Bliss, 9 Pick. 13; Ward *v.* Lamson, 6 Pick. 358; Brewer *v.* Pitkin, 11 Pick. 298; Russell *v.* Woodward, 10 Pick. 408.

conveyance; for we perceive no difference as to the effect on other creditors whether the estate be conveyed directly to the particular creditors, or with their assent to others in trust for them."[1]

The court, then, refused to uphold the assignment except as to such creditors as actually were assenting parties. The same principle applies where the assignee is not himself a creditor, and has in fact given no consideration for the conveyance to him, although a nominal consideration be expressed in the deed. Such a conveyance, though good between the parties, is not valid as against the creditors.[2] It is otherwise where the assignee is himself a creditor, for in that case he acts in two capacities, as creditor and as assignee: as assignee there is a consideration for the conveyance, because he has an interest; as creditor he can assent to the arrangement.[3] This is true, although he is the only creditor who assents; but the transfer must be not so much in excess of his claim as to furnish a presumption of fraud.[4]

The court will search for fraud in any such conveyance,[5] and will allow secret assignments with fraudulent intent to be proved by parol.[6] Of course the assignments must not only be pure from fraud, but they must be regular in form, and suitable to accomplish the purposes intended;[7] there must be proper covenants on the part of the assignee as to applying the property, and the assent of a creditor must appear to protect the assigned property from attachment.[8]

Now what could a creditor do who was not a party to the assignment? Where the assignment was invalid for any of the reasons

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[1] Page 154.

[2] Parker *v.* Kinsman, 8 Mass. 486 (1812). See Bradford *v.* Tappan, 11 Pick. 76, 78 (1831).

[3] Harris *v.* Sumner, 2 Pick. 129 (1824).

[4] Hastings *v.* Baldwin, 17 Mass. 552 (1822).

[5] Shaw, C. J., thus defines fraud: "But if under a pretence of a conveyance for the benefit of creditors the debtor transfers his property on any secret trust for himself, if it is attended with any of the known badges of fraud not satisfactorily explained or removed, the conveyance is void at law; . . . it must appear that the assignment was made upon a valuable and adequate consideration and in good faith to satisfy or secure real existing debts, or to indemnify against actual or subsisting liabilities." Russell *v.* Woodward, 10 Pick. 408, 412, 413 (1830).

[6] Hills *v.* Eliot, 12 Mass. 26 (1815).

[7] Quincy *v.* Hall, 1 Pick. 357 (1823); Harris *v.* Sumner, 2 Pick. 129 (1824).

[8] If the assignment requires it, the assent must be in writing. Brewer *v.* Pitkin, 11 Pick. 298 (1831); Ward *v.* Lamson, 6 Pick. 358 (1828). Assent may be shown by claiming the benefit of the assignment. May *v.* Wannemacher, 111 Mass. 202; Pierce *v.* O'Brien, 129 Mass. 314. It may be verbal. Wiley *v.* Collins, 11 Me. 193.

mentioned above, he could proceed as if it did not exist, and attach the property in the assignee's hands by trustee process. Even a debt due to the assignee was not exempted.[1] If the conveyance was valid, he might attach by trustee process the balance of property in the assignee's hands not needed to satisfy the claims of those creditors who had assented to the assignment;[2] and such attachment will hold the surplus as against subsequent assenting creditors.[3] It makes no difference in the creditor's right of attachment whether the assignment provides in terms for the payment of certain creditors only, or for the payment of all creditors; in either case the property is protected only to the extent of the assenting creditors' claims. The character of the property, whether real, personal, or *choses in action*, is immaterial, as is also the fact of the assignee's having converted it into money, if such should chance to be the case.[4]

Such in brief were the principal points decided up to the passage of the Act of 1836 regulating assignments. It is to be noted, in view of later decisions, that there are three possible meanings of the word "preference," and that a conveyance constituting a "preference" in either sense was perfectly good up to this time. The conveyance might be to one or more creditors to the exclusion of the others, — a simple preference; or in trust to pay certain creditors first, and the rest afterwards, — an assignment with preferences; lastly, an assignment without preferences for the benefit of all creditors who assent within a reasonable time might be considered by some a species of preference.

The Act of 1836 altered this state of things in two particulars: it provided, first, that all assignments must be free from preferences; and, second, that when made in accordance with the terms of the Act, they should be valid against attaching creditors.[5] The preferences forbidden by the Act were of the second kind mentioned above; that is to say, the Act did not impair the right to give a preference, except when the preference was contained in an assignment.[6] All creditors were allowed to become parties at any

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[1] Harris *v.* Sumner, 2 Pick. 129 (1824).

[2] Borden *v.* Sumner, 4 Pick. 265 (1826); Bradford *v.* Tappan, 11 Pick. 78 (1831); Fall River Iron Works *v.* Croade, 15 Pick. 11, 16 (1833), and cases cited.

[3] Bradford *v.* Tappan, 11 Pick. 78 (1831).

[4] Fall River Iron Works *v.* Croade, 15 Pick. 11, 16 (1833).

[5] St. 1836, ch. 238, §§ 1, 3.

[6] Henshaw *v.* Sumner, 23 Pick. 446 (1839); Brown *v.* Forster, 2 Met. 152, 154 (1840); Macomber *v.* Weeks, 3 Met. 512, 514 (1842); Burt *v.* Perkins, 9 Gray, 317 (1857).

time before the final dividend,[1] and only such debts were to be preferred as by the laws of the United States or of the Commonwealth were entitled to preference.[2] Any assignor complying with the provisions of the Act was to be discharged from his debts unless it appeared (1) that he had fraudulently concealed, reserved, or disposed of any property; (2) that he had made false statements concerning the disposition of his property; (3) that he had made any conveyance with a view to give a preference when in contemplation of insolvency; or (4) that he had given notice of his insolvency to any creditor with a view that he should obtain a preference.[3] To make the Act still stronger, it was provided further that "No assignment or conveyance made by any insolvent debtor to assignees or trustees for the use of any of his creditors shall be valid or effectual against an attachment or execution in behalf of any creditor who is not a party to it, unless it is so made as to allow all the creditors of the debtor to become parties to it, if they see fit; and unless also it is so made as to give to each of the creditors who shall become parties to it an equal share of the property in proportion to their respective debts, excepting only such creditors as may by the laws of the United States or of this Commonwealth be entitled in such case to a preference."[4]

Such were the provisions of the Act relevant to our inquiry. There were, besides, many provisions to secure its fair working and proper application, giving rise to many decisions with which we need not concern ourselves. Leaving now for the moment the subject of voluntary assignments, let us trace the development of the insolvent law.

The first Act regulating proceedings *in invitum* was passed in 1838,[5] and specified as the grounds upon which its aid could be invoked, the following: —

(1) If any person arrested on mesne process in an action for $100 or upwards should fail to give bail before the return day of process. (2) If any person should be imprisoned more than thirty days upon mesne process or execution in an action for $100 or upwards. (3) If any person whose goods or estate were attached in an action for $100 or upwards should not dissolve the attachment before the last day of the return term.[6]

It was provided that, in these cases, any creditor might apply, by

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[1] § 4. [2] § 3. [3] § 9. [4] § 11.

[5] St. 1838, ch. 163, § 19.

[6] Within seven days from the return day of the writ. Stat. 1851, ch. 189.

petition, within ninety days after the act alleged in the petition as the ground of proceedings, and not afterwards.

The Act of 1844[1] added four other grounds for proceedings against a debtor: —

(4) Removing himself or any part of his property from the State with intent to defraud creditors; (5) concealing himself to avoid arrest, or concealing any part of his property to avoid attachment; (6) procuring himself to be arrested or his property to be attached; (7) making any fraudulent conveyance or transfer of his property.[2]

The above provisions are substantially unchanged at the present day; another ground only having been added, (8) in a provision as to fraudulent stopping payment of commercial paper by certain classes of persons.[3] The ordinary provisions making fraudulent payments, transfers, and conveyances within six months of the filing of a petition against a debtor void under certain circumstances,[4] give a remedy to the assignee merely, and are not expressly made grounds for proceedings by a creditor.

Let us now return to voluntary assignments and consider what effect the insolvent laws have had upon them, either through their express provisions, above cited, or their mere existence.

In Carter *v.* Sibley,[5] there was an assignment under the Act of 1836, which would not have been good at common law, and the question therefore was whether the Act of 1836 was still in force. It was held that, as far as the statutes of 1838 and 1836 affected the same classes of persons, viz., those whose debts in the aggregate amounted to $500 or over,[6] the Act of 1838 repealed the assignment law.[7] It was afterwards decided that the eleventh section of the Act of 1836 was not repealed by the Act of 1838, so that creditors had the double protection of both Acts.[8] The assignment Act was expressly and entirely repealed in 1856.[9]

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1 St. 1844, ch. 178, § 9.

2 The person receiving such payment, transfer, or conveyance need not have reasonable cause to believe the debtor insolvent to make the transfer bad. St. 1856, ch. 284, § 29.

3 St. 1879, ch. 245, § 7. See St. 1894, ch. 261.

4 St. 1856, ch. 284, §§ 25–29; now P. S. ch. 157, §§ 96, 98.

5 4 Met. 298 (1842).

6 The law of 1838 operated only where the debts amounted to $500 or over. This was reduced by St. 1841, ch. 124, § 1, to $200.

7 See also Wyles *v.* Beals, 1 Gray, 233 (1854), where, however, this point was not necessary to the decision; Edwards *v.* Mitchell, 1 Gray, 239 (1854).

8 Zipcey *v.* Thompson, 1 Gray, 243 (1854).

9 Stat. 1856, ch. 163; but see 109 Mass. 38, 39.

If we now consider the cases arising under the Act of 1838 we shall find several *dicta* as to the effect of the insolvent law on voluntary assignments. In Wyles *v.* Beals,[1] a case of *scire facias* against a voluntary assignee, the assignment provided for the distribution of the property in precisely the same manner as it would have been distributed under the insolvent law. Shaw, C. J., mentioned several reasons why the assignment was invalid as against attaching creditors. The fifth reason was because it defeated the rights of creditors to proceed *in invitum* under the Act of 1838. Counsel for the defendant had argued that an assignment valid at common law was not void under the statute of 1838, unless the remedy provided by that law was invoked to set it aside; but the court said that, even if the property could be distributed precisely as it would have been under the insolvent law, yet the assignment was opposed to the whole spirit of the law. If it was proposed to pay a dividend to creditors not parties to the assignment, it was (as we have seen) bad at common law; if it did not pay everybody there was no equal distribution. It is to be noticed in the case that the assignment did not transfer all the property, and so was bad in any case, and the assignment did not follow closely in any respect the provisions of the insolvent law.

Edwards *v.* Mitchell[2] was to the same effect, though as Wells, J., says, in a later case,[3] the decision was "pointedly put on the statute of 1836." Neither in these cases, however, nor in the cases following them, is there any intimation that the assignment could be attacked by proceedings under the statute of 1838. They were all cases of trustee process by non-assenting creditors, and go no further than holding the assignments in question invalid as against attachment. Even then, if the assignee has distributed the property, there is no remedy,[4] and where the whole has not been distributed the assignee has a private set-off against a creditor, though not against the assignee in insolvency.[5]

The only case in which an assignment was avoided by a petition in insolvency was Bartlett *v.* Bramhall,[6] and there the petition was a voluntary petition by the debtor.

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[1] 1 Gray, 233 (1854).

[2] 1 Gray, 239 (1854). See also Zipcey *v.* Thompson, 1 Gray, 243 (1854), where, however, the assignment was bad under St. 1836, as containing preferences. Grocers' Bank *v.* Simmons, 12 Gray, 440 (1859); Stanfield *v.* Simmons, 12 Gray, 442 (1859).

[3] National Mechanics', etc. Bank *v.* Eagle Sugar Refinery, 109 Mass. 38 (1871).

[4] Leland *v.* Drown, 12 Gray, 437 (1859); Bowles *v.* Graves, 4 Gray, 117 (1855).

[5] Banfield *v.* Whipple, 14 Allen, 13 (1867).

[6] 3 Gray, 257 (1855).

Then came the important case of National Mechanics' and Traders' Bank *v.* Eagle Sugar Refinery.[1] This also was a trustee process against voluntary assignees, and, as before, the trust provided for a *pro rata* devision among all creditors who should come into it. It was held an attaching creditor could *not* upset the assignment. Wells, J., says: "It is to be observed that, under 1836, ch. 238, § 11, an assignment contrary to its provisions is declared to be invalid and ineffectual as against an attachment or execution in behalf of any creditor not a party to it, while under 1838, ch. 163, § 10, the invalidity could be availed of only by the assignee constituted by the proceedings in insolvency;" and later, "We are unable to see in what respect a conveyance to trustees, like the present, stands in any different relation to the general insolvent laws of Massachusetts, or the bankruptcy laws of the United States, from that of a simple conveyance to a creditor by way of preference. We are inclined, therefore, to ascribe to statute 1836, ch. 238, the whole legal effect of the decisions first referred to [Wyles *v.* Beals and cases following it]. That statute having been repealed, the assignment in question, even if voidable by an assignee in bankruptcy or insolvency, cannot be avoided by a creditor for his individual benefit without proof of that which would constitute fraud at common law."

To the same effect are the remarks of Woodbury, J., in Adams *v.* Blodgett.[2] That was an action of assumpsit by a creditor against the voluntary assignee. After noting that the assignment contained no preferences, and therefore was not *contra* to the Act of 1836, and that in any case that Act had been repealed by the Act of 1838, he says: —

"Nor does the Insolvent Act in terms prohibit any such conveyance as this, nor can it be implied from the fact that the two courses are exactly the same. They differ materially and unfavorably to the debtor. This trust dispenses with several forms and considerable expense, and holds the debtor still liable for the balance, whereas that course releases the debtor from liability for the balance, and subjects him to go through the statutory course in order to entitle himself to be released. . . . The insolvent statute of 1838 was held to repeal the assignment statute of 1836 because it substituted one statute system for another alike in substance, but differing in form. But here the Act of 1838 does not repeal the

[1] 109 Mass. 38 (1871).

[2] 2 Woodbury & Minot, 233 (1846), U. S. Cir. Ct., 1st Circuit.

present trust by an implication of this kind, because it is not a trust made under 1836, and differs in some particulars from both statutes."

So in Fairbanks *v.* Belknap,[1] where an arrangement had been made to have assignees *in pais* continue the business for the benefit of creditors, Devens, J., said: "There could be no fraudulent preference intended where the same security was offered to all, and where the plan was to be accepted by all or to be inoperative." These last three cases, and particularly the Eagle Sugar Refinery Case, cannot be reconciled with the earlier series beginning with Wyles *v.* Beals, and ending with Grocers' Bank *v.* Simmons and Stanfield *v.* Simmons, — the last two of the series having been decided subsequently to the repeal, in 1856, of the law of 1836.

To sum up, then, the results thus far reached: since the repeal of the assignment law of 1836, voluntary assignments stand as at common law, except so far as affected by the insolvent laws; and it has been strongly intimated that assignments in which all the creditors can come in on equal terms are not obnoxious to the spirit of those laws. It has been held that they cannot be attacked by attachment. The law also remains as before, that a preference, or an assignment containing preferences, cannot be avoided by a creditor by attachment or trustee process.

The question whether any preferences could be grounds for an involuntary petition, besides those fraudulent at common law, had been answered affirmatively in *Ex parte* Jordan,[2] which decided that any conveyance made with intent to give a creditor a preference was a ground for a petition. The same point was decided in Lothrop *v.* Highland Foundry Co.[3] This was a bill in equity to restrain a petition by a creditor alleging that the debtor had made two mortgages to secure the payment of pre-existing debts to the mortgagees, with intent to secure to them a preference, and to defraud his creditors. The principal point decided was that proceedings *in invitum* could be instituted after the repeal of the national Bankrupt Act for a cause occurring while the Act was in force, and incidentally that the conveyance in question was a ground of insolvency. It was also decided, *contra* to some *dicta* in *Ex parte* Jordan, that in proceedings *in invitum* the knowledge or intent of the person receiving the payment, transfer, or conveyance is immaterial, though it would be material in a proceeding by

[1] 135 Mass. 179 (1883).
[2] 9 Met. 292 (1845).
[3] 128 Mass. 120 (1880).

the assignee in insolvency to recover back the property. There is, however, in these cases no intimation that an assignment under which all the creditors have equal rights is a preference, or is a fraudulent conveyance which can be the ground of involuntary proceedings.[1]

Remembering then that a preference is a "fraudulent conveyance," within section 112 of the present insolvent law, we have now to consider the argument that this expression, "fraudulent conveyance," includes any conveyance which is in any way a fraud upon the law under any other section. It may be said that it is absurd to provide that assignees when appointed can avoid a certain conveyance, and yet to say that such a conveyance shall not be a ground on which to apply for an assignee. Conveyances which are frauds upon the law must be either (1) such as would avoid a discharge under section 93, or (2) preferences under section 96, or (3) to prevent the property being distributed under the insolvent laws, or to defeat the objects of its provisions under section 98, or, as it is elsewhere expressed, "conveyances in derogation of the jurisdiction."[2]

(1) But it has been held that an assignment without preferences will not avoid a discharge.[3]

(2) The language of section 93 is very similar to that of sections 96 and 98, and we have the direct authority of Fairbanks *v.* Belknap that it is not a preference.

(3) We have already considered some Massachusetts cases which say that an assignment whose provisions closely resemble those of the insolvent law, and which give creditors equal rights, cannot be opposed to the spirit of the law, for they accomplish precisely what the law itself does. Against these must be put the almost uniform interpretation of the bankruptcy Acts both in this country and in England. The limits of this article will not permit a detailed examination of these statutes and decisions; but this is unnecessary, because the decisions do not turn on any peculiar wording of the statutes, but proceed upon the general principle that a

[1] It is curious that the Highland Foundry Case does not mention a provision of the Act of 1856 to the express effect that a preference should be a ground of proceedings *in invitum* (St. 1856, ch. 284, § 25). The Commissioners on the General Statutes give no reason for omitting this provision in their report, and the inference is therefore that they supposed it was covered by other clauses. This Act, in common with the others, makes no mention of general assignments for the benefit of creditors.

[2] Cadwalader, J., in Barnes *v.* Rettew, 8 Phila. 133, 136.

[3] Atkins *v.* Spear, 8 Met. 490, 496 (1844).

bona fide assignment without preferences is of itself an act of bankruptcy.[1]

The early cases *contra* to this view seem to have been based largely on the opinion of Swayne, J., in Langley *v.* Perry,[2] and can no longer be considered law. On the other hand, the question has never been squarely decided by the Supreme Court of the United States, and in Mayer *v.* Hellman,[3] Field, J., remarked *obiter* that the position of counsel had much to commend it, viz., that such an assignment was only a voluntary execution of what the bankruptcy court can compel, and that, as it was not a proceeding in itself fraudulent as to creditors, and gave no preferences, it conflicted with no positive inhibition of the statute, citing the favorable opinion of Nelson, J., in Sedgwick *v.* Place[4] and of Swayne, J., in Langley *v.* Perry. In several cases assignments under State statutes regulating assignments have been held bad, because the State statutes were inconsistent with the bankrupt Acts,[5] and *contra* to the view sometimes expressed, that the assignments were held void because of what the statutes authorized, and not because the States attempted to regulate what Congress had said the general government alone should regulate;[6] these cases should be regarded as ambiguous on this point.[7]

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[1] For a case in the District of Massachusetts, see *Re* Union Pacific R. R. Co., 10 N. B. R. 178, Lowell, J. For the best general discussion of cases, see Globe Ins. Co. *v.* Cleveland Ins. Co., 14 N. B. R. 311, 315 (Cir. Ct., N. Dist. Ohio); Barnes *v.* Rettew, 8 Phila. 133 (1871, Cir. Ct., E. Dist. Pa.).

See also, to the same effect, Burrill on Assignments, 6th ed., §§ 29 ff. (1893); Bump on Bankruptcy, 10th ed., 421 (1877); Blumenstiel on Bankruptcy, 96 (1878); 1 Deacon on Bankruptcy, 3d ed., 68; 1 Christian on Bankruptcy, 2d ed., 135. There were no decisions on this point under the first bankruptcy Act of 1800. Under the second Act of 1841, see McLean *v.* Johnson, 3 McLean, 202; McLean *v.* Meline, 3 id. 199.

The following are some of the earlier cases and *dicta contra* to the above. Langley *v.* Perry, 2 N. B. R. 596 (Cir. Ct. Ohio); Farrin *v.* Crawford, 2 N. B. R. 602 (Cir. Ct. Ohio); Sedgwick *v.* Place, 1 N. B. R. 673 (S. Dist. N. Y.); *Re* Kintzing, 3 N. B. R. 217 (E. Dist. Mo.); *Re* Marter, 12 N. B. R. 185, 187 (E. Dist. Mich.); Smith *v.* Teutonia Ins. Co., 4 C. L. N. 130. See also *Re* Arledge, 1 N. B. R. 644 (S. Dist. Ga.); *Re* Hawkins, 2 N. B. R. 378 (Sup. Ct. Conn.); *Re* Wells, 1 N. B. R. 171 (N. Dist. N. Y.); Mayer *v.* Hellman, 91 U. S. 496, 500; Brown *v.* Minturn, 2 Gall. 557, 559; Reed *v.* McIntyre, 98 U. S. 507; Bishop on Insolvent Debtors, 2d ed., § 107.

For a detailed criticism of these cases, see Globe Ins. Co. *v.* Cleveland Ins. Co., 14 N. B. R. 311.

[2] 2 N. B. R. 576 (C. Ct. Ohio).

[3] 91 U. S. 496; s. c. 13 N. B. R. 440.

[4] 1 N. B. R. 673.

[5] See Boese *v.* King, 108 U. S. 379, 385 (1882); Reed *v.* McIntyre, 98 U. S. 509–513.

[6] Globe Ins. Co. *v.* Cleveland Ins. Co., *supra.*

[7] See Griswold *v.* Pratt, 9 Met. 16 (1845); Day *v.* Bardwell, 97 Mass. 246, 250 (1867); Lothrop *v.* Highland Foundry Co., 128 Mass. 122 (1880).

In spite of the *dictum* of Field, J., in Mayer *v.* Hellman, the great preponderance of authority in the Circuit and District Courts of the United States, and the uniform rule in England[1] is to regard voluntary assignments as acts of bankruptcy. As a matter of principle, it is not clear that a voluntary assignment *is* in fraud of the jurisdiction. How can the same act supply the jurisdiction and be a fraud upon it? The act of assignment must be on this theory an act in fraud of a right not yet acquired. And if the jurisdiction be not already there, why should making an assignment be singled out as the deadly sin? Why not every other act done by an insolvent person, or why not make insolvency itself a ground of proceedings *in invitum?*[2]

The State courts do not always take the same view as the Federal courts on this point. It is held in New York, for example, that the intent of the bankrupt in making the assignment is a question of fact, and that in order to institute proceedings on account of it, it must be shown that he had an intent to contravene some provisions of the bankrupt law, and that the assignee knew of that intent.[3]

Similarly in Maryland, under a statute providing that any conveyance by an insolvent shall be *prima facie* intended to delay creditors, an assignment without preferences is held not *prima facie* fraudulent.[4]

The second Act in Massachusetts, dealing specifically with assignments, was passed in 1887.[5] It provides that all acts of trustees under assignments, whose provisions are in substantial conformity with the provisions of the insolvent law, done in caring for the property and coverting it into money, shall be valid if the assignments have been assented to in writing by a majority in number and value of the unsecured creditors, even though subsequent proceedings in insolvency are instituted by or against the

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[1] They are now regulated by Act, 1883, 46 & 47 Vict. ch. 52, § 4; cf. 1 Jac. I. ch. 15; 6 Geo. IV. ch. 16; Worseley *v.* De Mattos, 1 Burr. 827.

[2] For a further presentation of this view, see Burrill on Assignments, 6th ed. § 32. He also points out that none of the debates in Congress on the Act of 1867 showed any intention to adopt the English construction of the language from which our Acts were taken. It had long been a matter of common knowledge, and it would have been a natural thing to embody such a decision in the new Act.

[3] Haas *v.* O'Brien, 16 N. B. R. 508 (1876, Ct. of Appeals, N. Y.); Von Hein *v.* Elkus, 15 N. B. R. 194 (Sup. Ct. N. Y.).

[4] Pfaff *v.* Perry, 29 Atl. Rep. 824 (Ct. of Appeal, Md. 1894).

[5] St. 1887, ch. 340.

debtor. It also provides that the assignees in insolvency, "if the assignment shall be voidable by them," shall be entitled to recover the net proceeds in money of any sales of property by the voluntary assignee. This statute does not help us much on the question we have been considering. On the one hand, it does not distinctly recognize assignments as valid, but only protects the acts of trustees to a certain extent, and in certain cases; and, on the other hand, it protects them even where proceedings are instituted against the debtor upon some ground of section 112, other than a fraudulent conveyance. At first sight, the expression, "if the assignment shall be voidable," would seem to imply that some assignments are not voidable; the force of this inference is weakened, however, by its ambiguity. An assignment might be valid under this section either because it was not in itself a fraudulent conveyance or because the action to avoid it was not brought in due season. The Act is, therefore, too ambiguous to allow of strong inferences for or against the validity of voluntary assignments in general. Of considerable weight, however, is the fact that the Legislature, dealing with the general subject in this Act, with a knowledge that assignments were being made every day of the session, did not condemn them plainly or directly make them acts of insolvency.

We arrive, then, at this result. The question is still open in Massachusetts. The strongest considerations of convenience require that the system of voluntary assignments shall be upheld. By that method the business affairs of a debtor can often be settled in three months, — frequently the arrangements are substantially completed in a few weeks, or even days, — while at least six to twelve months are required under the insolvent law. In practice, although the assignee is usually chosen by the debtor, yet care is taken to choose a man who has the confidence of the creditors, in order to induce them to come into the arrangement. The fear of delay by insolvency proceedings, and of frightening away the creditors, will in general be sufficient to induce the debtor to have the assignment drawn in a fair and equitable form. Any assignment with unjust or fraudulent provisions, may be a ground of proceedings *in invitum* at once. The expense is also much less under a voluntary assignment, and the simplicity and speediness of the method may often make possible great economy in the business adjustments of the debtor.

It cannot be denied that there is some force in the arguments

against assignments based on the penal provisions of the insolvent Acts,[1] the power there given to examine the debtor under oath, and the machinery to set aside conveyances in fraud of equitable distribution. At the same time, the number of cases in which these provisions are needed is not large. In such cases a resort to proceedings under the insolvent law, in the first instance, would be much more likely to happen than not, and a debtor of that kind would be apt to give his creditors plenty of chances to invoke its help.

Our court, then, would have good reason, on Massachusetts authorities, in upholding voluntary assignments. Yet it is more than likely that they will follow the analogy of the bankruptcy Acts if the question ever comes before them.[2] The best course would be not to overthrow a system as old as the Commonwealth by a single decision, — for no one would dare to assign if a single churlish creditor could upset the assignment, — but, if further protection is needed for creditors, to let the Legislature give it in a way to protect assignments already in progress, and at the same time to simplify and expedite the course of the insolvent law.

Prescott F. Hall.

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[1] P. S. ch. 157, § 119. See Emmons, J., in Globe Ins. Co. *v.* Cleveland Ins. Co. 14 N. B. R., 311 at 325.

[2] Since this article was written, some of the questions herein discussed have come before the court in the case of Steel Edge Stamping and Retinning Co. *v.* Manchester Savings Bank. The validity of a voluntary assignment was raised by a bill in equity to stay insolvency proceedings. The writer was unaware of the case until after this article was finished. The case was argued Dec. 5 and 6, 1894, but the decision has not yet been handed down.